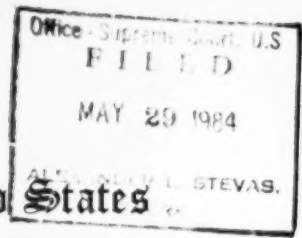


No. 83-1734  
IN THE  
**Supreme Court of the United States**



October Term, 1983

JOHN R. BALELO, *et al.*,

*Petitioners,*

*vs.*

MALCOLM BALDRIGE, Secretary of Commerce of the United  
States, *et al.*,

*Respondents.*

**BRIEF OF RESPONDENTS ENVIRONMENTAL  
DEFENSE FUND, INC. AND DEFENDERS OF  
WILDLIFE IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI.**

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## QUESTIONS PRESENTED

1. Whether the en banc panel of the Ninth Circuit properly ruled, after a detailed analysis of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 et seq. and its legislative history, that the Secretary's exercise of his broad MMPA rulemaking authority to require use of observer data for MMPA enforcement is fully consistent with, and indeed essential to implementation of, the MMPA and has been authorized, adopted and approved by Congress?

2. Whether the en banc panel of the Ninth Circuit properly ruled, after careful consideration of this Court's precedent, that use of observer data for MMPA enforcement falls well within the "pervasively regulated industry" exception to the warrant requirement, because (a) the tuna fishing industry has long been subject to detailed federal regulation, (b) the use of observers is the only means for effectuating the important federal interests embodied in the MMPA, and (c) the observer program itself provides all the safeguards that would be provided were an administrative warrant required in this case?

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**BRIEF OF RESPONDENTS ENVIRONMENTAL  
DEFENSE FUND, INC. AND DEFENDERS OF  
WILDLIFE IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI.**

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Intervenor-defendants and respondents Environmental Defense Fund, Inc. and Defenders of Wildlife respectfully request this Court to deny petitioners' prayer for a writ of certiorari to review the judgment and opinion en banc of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1984.

**PROVISIONS OF CONSTITUTION, STATUTE  
AND REGULATION INVOLVED.**

Petitioners fail to set forth in their Appendix all the relevant provisions of the Marine Mammal Protection

Act, Title 16 United States Code Section 1361, *et seq.* Respondents' Appendices pp. 1a-34a, below, set forth Title 16 United States Code Sections 1361, 1362, 1371, 1372, 1373, 1374, 1375, 1377 and 1381.

## **STATEMENT OF THE CASE.**

### **A. The Decision Below.**

This case involves the statutory and constitutional propriety, under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq.*, of the use of scientific observers on board tuna vessels to monitor compliance with the provisions of the MMPA and the regulations promulgated thereunder, which are designed to prevent needless killing and injury to marine mammals in the course of tuna fishing.

By a decisive vote, an en banc panel of the Ninth Circuit (the "en banc court") rejected petitioners' challenge to the statutory and constitutional propriety of the use of observer data for MMPA enforcement purposes. First, by a 9-2 vote based upon a careful analysis of the MMPA and its legislative history, the en banc court rejected petitioners' contention that in enacting and subsequently amending the MMPA, Congress had not authorized use of observers to ensure compliance with the MMPA. En Banc Op., Pet. App. at 7a-15a. Second, by an 8-3 vote, the en banc court rejected petitioners' argument that use of observers violated the fourth amendment, ruling that even if observation of fishing activities in plain view on vessel decks and the high seas constituted a "search" for fourth amendment purposes, use of observers for MMPA enforcement purposes falls well within the "pervasively regulated industry" exception to the fourth amendment warrant requirement. En Banc Op., Pet. App. at 15a-21a.

Petitioners completely distort the record by arguing that observers are broad criminal law enforcement agents authorized to conduct wide-ranging searches of private areas of tuna vessels and the crew to uncover evidence of any violation of law, whether or not connected with the MMPA. Pet. at 8-11. In fact, observer activities are tightly circumscribed by the MMPA and the applicable regulations. Observers do not “search” areas of the vessel, such as living quarters, in which petitioners or their crews have legitimate privacy interests. Rather, observer data collection activities are limited to observation of fishing activities—the only activities within the MMPA regulatory mandate—which take place on open vessel decks and the high seas. *En Banc Op.*, Pet. App. at 19a-21a; JER at 412-13, 416-18, 500-02.<sup>1</sup> Moreover, petitioners concede that observers may be on their vessels for scientific and research purposes; they only object to use of observer data in MMPA civil and criminal enforcement proceedings. *En Banc Op.*, Pet. App. at 7a; JER at 13-17, 373.<sup>2</sup> In order to correct petitioners’ misstatements, respondents set forth below the undisputed facts in the record.

#### **B. The Enactment and Implementation of the MMPA.**

Until recently, petitioners fished for tuna by means of “purse seines” in an area of over four million square miles in the eastern tropical Pacific Ocean. During this

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<sup>1</sup>The Petition for Certiorari will be cited herein as “Pet. at \_\_\_\_.” Petitioners’ Appendix will be cited herein at “Pet. App. \_\_\_\_.” The en banc opinion of the United States Court of Appeals for the Ninth Circuit, reported at 724 F.2d 753 (9th Cir. 1984) and reproduced in Petitioners’ Appendix at 1a-35a, will be cited herein as “*En Banc Op.*, Pet. App. at \_\_\_\_.” The parties’ Joint Excerpt of Record before the Ninth Circuit will be cited herein as “JER at \_\_\_\_.”

<sup>2</sup>To date, the Secretary has only sought civil penalties for MMPA violations, and has not filed any criminal proceedings.

time period, between a quarter and a third of the tuna caught by the American fleet has been caught in association with porpoises, by a method known as purse seining "on porpoise." In this process, each year thousands of porpoises — air-breathing social mammals — are killed, their carcasses discarded into the sea. *En Banc Op., Pet. App. at 3a.*

To avert a biological catastrophe of potentially major proportions, Congress in 1972 enacted the MMPA. In explicit terms, the MMPA proclaimed an "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a)(2). To achieve this goal, Congress in MMPA Sections 1373 and 1374 granted the Secretary of Commerce broad powers to promulgate and enforce regulations designed to ensure realization of the MMPA objective that populations of marine mammals are not diminished below optimum sustainable levels. Thus, the MMPA directs the Secretary

to prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) *as he deems necessary and appropriate to insure* that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in Section 1361 of this title.<sup>3</sup>

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<sup>3</sup>In its MMPA Declaration of Policy, Congress stated that "... Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and ... they should be protected ... to the greatest extent feasible. ..." 16 U.S.C. § 1361.

16 U.S.C. § 1373(a) (emphasis added). The regulations are to include restrictions on "fishing techniques which have been found to cause undue fatalities to any species of a marine mammal in a fishery." 16 U.S.C. § 1373(c)(5).

MMPA Section 1374 empowers the Secretary to issue permits authorizing incidental taking of marine mammals so long as such permits are consistent with any regulations issued under Section 1373. 16 U.S.C. § 1374(b)(1). Without such permits, any fishing operations involving any incidental or purposeful taking of marine mammals — e.g., petitioners' purse-seining operations — are unlawful under the MMPA. MMPA Section 1374(b)(2)(d) grants the Secretary broad powers to specify "any other terms or conditions which . . . [he] deems appropriate" to the issuance of permits, and Section 1374(d)(1) authorizes the Secretary to prescribe "such procedures as are necessary to carry out this section." *See En Banc Op., Pet. App. at 5a-6a.*

#### C. The Observer Program and the Challenged Regulation.

Pursuant to his broad rulemaking powers under MMPA Sections 1373 and 1374 — which became effective upon the expiration of the tuna industry's two-year MMPA Section 1371(c) exemption in October 1974 — the Secretary promulgated regulations allowing the incidental taking of porpoises under a permit system which prescribes annual quotas setting permissible levels of marine mammal takings, and specifies detailed requirements concerning fishing gear and methods of fishing operations designed to ensure minimum porpoise mortality. *See Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297, 300-303 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976). In addition, as an essen-



tial part of satisfying his MMPA obligations, the Secretary continued to make use of observers for scientific research and data collection purposes.<sup>4</sup>

Beginning in 1976 — pursuant to the regulation challenged in this action, the present version of which is codified as 50 C.F.R. Section 216.24(f) — the Secretary began to use observer-collected data for MMPA enforcement purposes. *En Banc Op.*, *Pet. App.* at 6a, 12a; *JER* at 500. Petitioners do not now dispute that the use of observers is the *only* feasible means of assuring that the MMPA will be enforced.<sup>5</sup> Until recently, the tuna fishing industry operated over an area of well over four million square nautical miles in the eastern tropical Pacific Ocean from off the coast of Australia to the coast of North, Central and South America. *JER* at 177; *Pet.* at 5 n.3.<sup>6</sup> In view of the unique situs of petitioners' opera-

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<sup>4</sup>These functions, to which petitioners have never objected, *see En Banc Op.*, *Pet. App.* at 7a; *JER* at 13-17, 373, have been critical to the Secretary's ability to make the findings required by MMPA Section 1373(d) as a prerequisite for issuance of any permits for fishing operations which involve the incidental taking of marine mammals. Information collected by observers concerning the effectiveness of various fishing methods and techniques in reducing porpoise mortality has also been of critical importance to the Secretary in promulgating regulations — required by the MMPA, *see, e.g.*, 16 U.S.C. §§ 1371(a), 1371(a)(2), 1373 — which are designed to reduce mortality and serious injury to porpoises to levels approaching zero. *See En Banc Op.*, *Pet. App.* at 3a-4a.

<sup>5</sup>Although petitioners argued below that there existed "less intrusive means" of obtaining MMPA-related data, such as the use of aerial overflights, this contention was flatly rejected by the *en banc* court, and petitioners do not renew it here. *See En Banc Op.*, *Pet. App.* at 20a.

<sup>6</sup>The majority of tuna vessels has recently shifted the locus of its fishing operations from the eastern to the western tropical Pacific, where tuna fishing is *not* accomplished by "purse seines," does *not* involve takings of marine mammals, and is *not* subject to the MMPA permit system and regulations. *See Marine Mammal Commission, Eleventh Annual Report to Congress for Calendar Year 1983* at 44 (January 31, 1984) (submitted to Congress

tions, absent the use of observers for MMPA enforcement purposes the Secretary would be wholly unable to ensure compliance with the detailed MMPA quotas and the MMPA regulations setting out permissible methods of tuna fishing operations. En Banc Op., Pet. App. at 11a, 20a.

The observer program gives observers no discretion as to which vessels to board. Vessels which are to carry observers are selected each year by neutral criteria. See JER 445-54. In advance of each year, the Secretary sends a calendar of scheduled observer trips to all vessel owners, along with a statement of the neutral criteria upon which the calendar is constructed. See *id.* The agency then conducts pre-departure conferences with all parties to ensure a common understanding of the scope of the observers' activities. En Banc Op., Pet. App. at 19a-20a; JER at 445-59.

Observer data collection activities on board the vessels are precisely delineated and sharply circumscribed. As the en banc court found, both 50 C.F.R. § 216.24(f) and particularly the National Marine Fisheries Services ("NMFS") Field Manual authorize observers to engage in observation and recording of *only* those activities directly subject to MMPA and its regulations. En Banc Op., Pet. App. at 19a-21a; JER at 99-115, 428-44, 502. Observer data collection activities thus involve only observation of fishing operations which occur on open vessel decks and the high seas. En Banc Op., Pet. App. at 16a; JER at 412-13, 416-18, 502. While observers must of necessity eat and sleep with the crew and are not physi-

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pursuant to MMPA Section 1404). That the tuna fishing industry may conduct its operations in a manner not subject to the MMPA and the observer requirement defeats petitioners' "unconstitutional condition" argument (see Pet. at 18-19), which in any event was rejected by the en banc court and is without merit. See En Banc Opp., Pet. App. at 5a-6a, 15a-22a.

cally confined to particular areas of the vessel, they have no authority whatsoever to record or report activities occurring in private areas of the vessel, or "to conduct searches of the persons, personal effects, or living quarters of the [petitioners] and their crews." En Banc Op., Pet. App. at 21a. As the en banc court expressly ruled, any such intrusive searches — which the record reflects have never taken place — "would have to be independently justified under the fourth amendment." *Id.*

### SUMMARY OF REASONS FOR DENYING THE WRIT.

Under the standards set forth in Rule 17 of the Rules of this Court, this case does not merit review by certiorari.

*First*, as petitioners concede, *see* Pet. at 10, there is no conflict in the circuits on the issues presented by this case. *See* Rule 17.1(a). To the extent circuits other than the Ninth have considered Congress' intent in enacting the MMPA, they are in accord with the en banc court's conclusion here that the MMPA must be construed to give effect to Congress' unmistakable intent to protect marine mammals. *See Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976); En Banc Op., Pet. App. at 11a. Similarly, the only other circuit which has directly considered whether the "pervasively regulated industry" exception to the fourth amendment warrant requirement applies in the absence of explicit congressional authorization has concluded, as did the en banc court here, that express congressional authorization is not a prerequisite. *See United States v. Rucinski*, 658 F.2d 741 (10th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

*Second*, this case does not decide an important question of federal law which requires resolution by this Court. *See* Rule 17.1(c). As petitioners concede, as a

practical matter the impact of the en banc opinion here will not extend beyond the Ninth Circuit, because "the impact of the [observer] regulation . . . is, for all practical purposes, geographically circumscribed by . . . the Ninth Circuit." Pet. at 10. Contrary to petitioners' argument, *see* Pet. at 8-10, this case does not establish new legal principles of wide-ranging application. Rather, the en banc court here was required only: (1) to engage in a particularized and detailed inquiry into the MMPA itself and its legislative history, *see* En Banc Op., Pet. App. at 7a-15a; and (2) to conclude that under the particular statutory and regulatory scheme at issue in this case, and under the unique facts of this case, observation of fishing activities which take place on open vessel decks and the high seas does not violate the fourth amendment, *see id.* at 15a-21a.

Thus, as Judge Nelson's concurrence below carefully points out, the en banc court's opinion has application only to the circumstances presented by this case: a regulatory scheme, directed towards a particularized and unique tuna fishing industry, with compelling enforcement needs by virtue of that industry's conduct of its business thousands of miles from land on the high seas. *See* En Banc Op., Pet. App. at 22a-23a. Indeed, as this Court recently emphasized, fourth amendment issues relating to activities on the high seas are *sui generis*, and their decision does not translate into principles applicable in far more common land-based fourth amendment cases. *See United States v. Villamonte-Marquez*, — U.S. —, 77 L. Ed. 2d 22 (1983).

*Third*, this case is not at odds with applicable decisions of this Court. *See* Rule 17.1(c). In holding that the MMPA itself and its legislative history amply support the Secretary's exercise of his MMPA enforcement authority, the en banc court relied upon a long line of this

Court's precedent that a statute is not to be construed so as to render it a nullity, and that where Congress has been made aware of an administrative construction of a statute and has amended or reauthorized the statute without a hint that the administrative construction is at odds with the will of Congress, the administrative construction is entitled to great weight. *En Banc Op.*, Pet. App. at 7a-13a; *see, e.g., Haig v. Agee*, 453 U.S. 280, 291 (1981); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). And in holding that observation of fishing activities which take place on open vessel decks and the high seas does not violate the fourth amendment, the en banc court properly relied upon this Court's precedent outlining the "pervasively regulated industry" exception to the fourth amendment warrant requirement. *En Banc Op.*, Pet. App. at 15a-21a; *see e.g., Donovan v. Dewey*, 452 U.S. 594, 599-602 (1981).

*Fourth*, the en banc court's careful and exhaustive opinion, analyzing in great detail both the congressional authorization and fourth amendment issues, does not merit review. *See En Banc Op.*, Pet. App. at 7a-15a (authorization issue); *id.* at 15a-21a (fourth amendment issue). Both segments of the en banc court's ruling were by a decisive vote: (1) the legislative authorization issue commanded the votes of Circuit Judges Browning, Sneed, Kennedy, Anderson, Schroeder, Pregerson, Alarcon, Nelson and Canby; and (2) of these circuit judges, only Judge Canby (along with Judge Ferguson) joined the dissent of Judge Tang on the fourth amendment issue.

Only by ignoring the facts and the en banc court's careful findings are petitioners able to create the impression that observers are broad-based law enforcement agents authorized to conduct unprecedented and wide-ranging "searches" of private areas of tuna vessels to uncover evidence of any type of criminal wrongdoing. *See Pet.* at 8-10. Petitioners' mischaracterization of ob-

server activities stands as the centerpiece of their effort to convince this Court that this case merits review. In fact, as the en banc court found: (1) observers are only authorized to observe and report on fishing activities in plain view on vessel decks and the high seas, *see* En Banc Op., Pet. App. at 16a; (2) observers' activities are tightly circumscribed by the MMPA itself, the applicable regulation, and detailed administrative guidelines, *see id.* at 19a-21a; and (3) observers are not authorized to, nor have they in fact ever conducted, "searches" of private areas of tuna vessels even to uncover evidence of MMPA violations, much less violations of other laws. *See id.* at 19a-21a.

Finally, the propriety of the en banc court's ruling is made clear by this Court's recent decision in *Oliver v. United States*, \_\_\_ U.S. \_\_\_, 52 U.S.L.W. 4425 (April 17, 1984). Confirming the views expressed below by Judge Pregerson in concurrence, *see* En Banc Op., Pet. App. at 21a-22a, *Oliver* holds that where individuals engage in activities such as cultivation of crops in settings exposed to the public view — whether from adjacent property or by aerial overflight — they have no reasonable expectation that these activities will be private. Thus, government observation of such activities does *not* constitute a "search" within the meaning of the fourth amendment. *See* 52 U.S.L.W. at 4428. *Oliver* controls here. Just as in *Oliver* no reasonable expectation of privacy could attach to the harvesting of crops in open fields, here petitioners have no reasonable expectation of privacy regarding their harvesting of precious marine mammal resources, conducted on open vessel decks and the high seas in plain view of passers-by. Indeed, petitioners so conceded below by suggesting — contrary to the undisputed evidence, *see* En Banc Op., Pet. App. at 11a — that MMPA enforcement could be accomplished by observations conducted through aerial overflights or from adjoining Coast Guard vessels. *See* JER at 60.

**REASONS FOR DENYING THE WRIT.**

**A. THE EN BANC COURT PROPERLY RULED THAT USE OF OBSERVER DATA FOR MMPA ENFORCEMENT IS FULLY CONSISTENT WITH THE MMPA AND HAS BEEN AUTHORIZED AND APPROVED BY CONGRESS.**

Petitioners essentially concede the propriety of the en banc court's ruling — applying this Court's precedent regarding statutory construction and the import of legislative history — that use of observer-collected data for MMPA enforcement is fully consistent with the MMPA, and has been authorized and approved by Congress. En Banc Op., Pet. App. at 7a-13a. Petitioners' sole argument is that 50 C.F.R. Section 216.24(f) is contrary to the "reasonable cause" requirement for warrantless "search[es] . . . [of] vessels" under MMPA Section 1377(d). *See* Pet. at 10-13. The en banc court properly rejected this argument. En Banc Op., Pet. App. at 15a. There is thus no reason for this Court to review the en banc court's ruling that to read the MMPA as precluding use of observer data for MMPA enforcement purposes would be improperly to render the MMPA itself a nullity. *See* En Banc Op., Pet. App. at 10a-11a.

**1. Petitioners Do Not Challenge the En Banc Court's Findings Regarding the Secretary's Broad MMPA Rulemaking Powers, and the MMPA's Purpose and Legislative History.**

Following a careful analysis of the MMPA and its legislative history, the en banc court properly reached the following conclusions, none of which petitioners dispute:

- (1) MMPA Sections 1373 and 1374 grant the Secretary broad power to promulgate regulations "necessary and appropriate" to enforce the MMPA's rigorous conservationist mandate that marine mam-

mals are not needlessly to be slaughtered in the course of petitioners' tuna fishing business. En Banc Op., Pet. App. at 8a-9a.

(2) Since the mid-1970's, the Secretary has consistently interpreted this power to authorize the use of observers for MMPA research and enforcement purposes, and this longstanding administrative construction is presumptively correct "unless there are compelling indications that it is wrong." En Banc Op., Pet. App. at 9a-10a, quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981) and citing other decisions of this Court.

(3) The "paramount purpose" of the MMPA is the "protection and conservation of marine mammals," and Congress intended the MMPA to be vigorously enforced. En Banc Op., Pet. App. at 10a-11a, citing 16 U.S.C. § 1371; *Committee for Humane Legislation v. Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976).

(4) "Effective implementation of the MMPA would be impossible without the use of observers for enforcement purposes," En Banc Op., Pet. App. at 11a.

(5) To construe the MMPA as not authorizing use of observer-collected data for MMPA enforcement — is "the only practicable method" of enforcing the MMPA — would be to render the MMPA a nullity, a result inappropriate "in the absence of compelling evidence." En Banc Op., Pet. App. at 10a-11a, quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

(6) With full knowledge of the continued existence of the observer program and its enforcement aspects gained from oversight hearings and hearings on proposed MMPA amendments, Congress three times



reauthorized the MMPA, twice without substantive amendment (in 1977 and 1978) and once with amendments (in 1981), without in any way disturbing the Secretary's authority to continue the observer program. En Banc Op., Pet. App. at 12a; *see also id.* at 12a nn. 10 & 11.

(7) Congress' actions give rise to a presumption that Congress has authorized, approved and adopted the Secretary's construction of his MMPA Section 1373 and 1374 rulemaking powers to require use of observer data for MMPA enforcement. En Banc Op., Pet. App. at 12a-13a, citing *Haig v. Agee*, 453 U.S. 280, 301 (1981), and other decisions of this Court.

**2. The En Banc Court Properly Ruled That MMPA Section 1377(d) Does Not Apply to Observer Data Collection Activities.**

Ignoring the en banc court's painstaking analysis of the MMPA and its legislative history, petitioners argue that Congress in MMPA Section 1377(d)(2) set forth a specific "search and seizure standard," authorizing warrantless searches of vessels only if there is reasonable cause to believe a MMPA violation has occurred,<sup>7</sup> and that 50 C.F.R. Section 216.24(f) is inconsistent with this

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<sup>7</sup>MMPA Section 1377(d) empowers persons "authorized by the Secretary to enforce" the MMPA to, "in addition to any other authority conferred by law":

(2) with a warrant or other process, or *without a warrant if he has reasonable cause to believe* that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, *search such vessel or conveyance and arrest such person.*

(Emphasis added.) Other subsections of Section 1377(d) grant enforcement officers powers of arrest and seizure.

standard. Pet. at 10-13.<sup>8</sup> The en banc court properly concluded that by the prefatory phrase in Section 1377(d) “in addition to other authority conferred by law,” Congress intended to permit the MMPA to be enforced by methods other than those enumerated in Section 1377(d), including regulations — like 50 C.F.R. Section 216.24(f) — promulgated pursuant to the broad rulemaking powers set forth in MMPA Sections 1373 and 1374. En Banc Op., Pet. App. at 15a.

Moreover, petitioners’ argument rests upon the fundamentally erroneous premise that even by its very terms, MMPA Section 1377(d) applies to observer data collection activities. In fact, observer data collection, which is limited to boarding the vessel and observation of fishing activities which take place on open vessel decks and the high seas, does *not* involve “search[es] . . . [of] vessel[s]” subject to MMPA Section 1377(d). Petitioners’ implicit and unarticulated argument to the contrary — which assumes that if observer activities technically constitute a fourth amendment “search,” they automatically involve a “search . . . [of the] vessel” within the meaning of MMPA Section 1377(d) — is in direct conflict with precedent of this Court and the circuit courts which finds a constitutionally and statutorily significant differences between vessel boarding and plain view observations on vessel decks — which observers do — and more thoroughgoing “searches” of private areas of the vessel — which

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<sup>8</sup>Petitioners also argue in a footnote that the expiration of MMPA Section 1381(d), which required the Secretary to use observers for scientific research purposes, on October 21, 1974 — the day that commercial tuna fishing operations became subject to MMPA permits and regulations under Sections 1373 and 1374 — means that Congress intended to preclude any further use of observers after that date. Pet. at 12 n. 7. The en banc court properly rejected this argument, concluding that Congress in MMPA Section 1381(d) had provided a “model of Congress’ view as to what was necessary to carry out the purposes of the statute.” En Banc Op., Pet. App. at 13a-14a.

observers may not and do not perform, and which are governed by MMPA Section 1377(d).<sup>9</sup>

Thus, in *United States v. Villamonte-Marquez*, — U.S. —, 77 L. Ed. 2d 22 (1983), this Court last term upheld a warrantless boarding and license inspection on the open deck of a vessel with access to the open seas under “the overarching principle of ‘reasonableness’ embodied in the Fourth Amendment.” *Id.* at 31. In so doing, *Villamonte-Marquez* emphasized the limited degree of intrusion on individuals’ reasonable expectations of privacy. *Id.* at 33. In language equally applicable to observer data collection activities, this Court stressed that the boarding and inspection in *Villamonte-Marquez* involved only “public areas” of the vessel, and that “[n]either the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to *what can be seen without a search.*” *Id.* at 33, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (emphasis added; brackets supplied by this Court).<sup>10</sup>

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<sup>9</sup>This Court’s recent decision in *Oliver v. United States*, — U.S. —, 80 L.Ed.2d 214 (1984), confirms that observer data collection activities are not “searches” within the meaning of the fourth amendment. See En Banc Op., Pet. App. at 21a-22a (Ferguson, J. concurring); Section B.1 at pp. 18-20 below.

<sup>10</sup>See also *United States v. Raub*, 637 F.2d 1205, 1210 (9th Cir.), cert. denied, 449 U.S. 922 (1980) (while boarding of vessel for inspection of documents might constitute a “search” within the meaning of the fourth amendment, it did not constitute a “search . . . [of the] vessel” within the meaning of Section 776d(d) of the Sockeye Salmon or Pink Salmon Fishing Act of 1947, 16 U.S.C. § 776d(d) — which required reasonable cause to conduct such a search — because it resulted in only a limited intrusion on non-private areas of the vessel); *United States v. Lee*, 274 U.S. 559, 563 (1927) (distinguishing between observation on vessel deck and “exploration below decks or under hatches”); *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc) (no privacy interest in any part of the vessel hold which would have been in plain view of an agent checking the vessel’s identification number; court expresses “serious doubts” as to the existence of a reasonable expectation of privacy in any area of the hold); *United*

As in *Villamonte-Marquez*, the intrusion here on privacy interests occasioned by observer boarding and data collection activities is extremely limited, if at all existent. As the en banc court correctly concluded, "the safeguards built into the observer program ensure that there will be no significant intrusion on [petitioners'] fourth amendment interests." En Banc Op., Pet. App. at 20a. Petitioners can cite no evidence to challenge the en banc court's findings that: (1) observers' activities are limited to data collection related to enforcement of the MMPA, En Banc Op., Pet. App. at 19a-21a; (2) "observers must confine their observations to the fishing operations of the vessel, which occur on the open sea or on deck," *id.* at 16a; *see also* JER at 412-13, 416-18, 502; and (3) the observer regulation and the NMFS Field Manual "do not authorize observers to conduct searches of the persons, personal effects, or living quarters of the captains and their crews. Such a search would have to be independently justified under the fourth amendment." En Banc Op., Pet. App. at 21a.

The en banc court thus properly concluded that MMPA Section 1377(d) does not govern or preclude use of observer data for MMPA enforcement. Because the en banc court properly concluded that use of observers for MMPA enforcement purposes is fully consistent with — indeed mandated by — the MMPA, there is no reason for this Court to accept this case for review.

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*States v. Whismire*, 595 F.2d 1303, 1312 (5th Cir. 1979), *cert. denied*, 448 U.S. 906 (1980) (emphasis added) (particular vessel area examined is a "crucial" factor in determining the reasonableness of crew's expectations of privacy; court finds it "difficult to see that a crew member might legitimately claim privacy on the open deck of a fishing smack or in the hold of a cargo vessel . . .").

**B. THE EN BANC COURT PROPERLY RULED THAT USE OF OBSERVER DATA FOR MMPA ENFORCEMENT DOES NOT VIOLATE THE FOURTH AMENDMENT.**

The en banc court ruled that even if observer activities constitute "searches" within the meaning of the fourth amendment, use of observer data for MMPA enforcement falls squarely within the "pervasively regulated industry" exception to the warrant requirement. En Banc Op., Pet. App. at 15a-21a. Petitioners argue that this exception is inapplicable because (1) the observer program has not been expressly authorized by Congress, and (2) the observer program does not require use of "surprise" inspections. Pet. at 14-16. In a manner fully consistent with this Court's precedent, the en banc court rejected these arguments. Indeed, this Court's recent decision in *Oliver v. United States*, — U.S. —, 52 U.S.L.W. 4425 (April 17, 1984) confirms that observers do not "search" within the meaning of the fourth amendment. There is thus no reason for this Court to review the en banc court's ruling that the observer program is fully consistent with the fourth amendment.

**1. Under This Court's Recent Decision in *Oliver v. United States*, Observers Do Not "Search" Within the Meaning of the Fourth Amendment.**

The en banc court did not decide the threshold issue of whether observer data collection activities involve "searches" within the meaning of the fourth amendment. See En Banc Op., Pet. App. at 15a-16a. Instead, the en banc court concluded that even if "searches," observer activities fall within the scope of the "pervasively regulated industry" exception to the fourth amendment warrant requirement. *Id.* at 16a-21a.

In his concurring opinion, however, Judge Pregerson specifically concluded that observer data collection activities do not constitute "searches." Judge Pregerson reasoned that petitioners cannot have a reasonable expectation of privacy regarding their observed fishing operations because: (1) they have no subjective expectation of privacy regarding fishing operations which take place on the open decks of tuna vessels and on the high seas; and (2) that any claimed expectation of privacy regarding purely commercial fishing operations is not one that society is willing to treat as reasonable. En Banc Op., Pet. App. at 21a-22a.

Judge Pregerson's analysis is confirmed by this Court's recent decision in *Oliver v. United States*, — U.S. —, 52 U.S.L.W. 4425 (April 17, 1984). In holding that an entry by police officers onto a privately-owned field used for cultivation of crops did not constitute a fourth amendment search, this Court focused on the nature of the activities involved:

[o]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from governmental interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.

52 U.S.L.W. at 4428. *Oliver* further emphasized that any claim to a reasonable expectation of privacy there was undercut by the fact that the harvesting operations were visible from adjoining land or by aerial overflights. See *id.*

*Oliver* is fully applicable here. Just as there is no societal interest in protecting the privacy of harvesting crops in open fields, there is no societal interest in protecting the privacy of the harvesting of ocean resources that occurs on open vessel decks and the high seas.

Moreover, as petitioners themselves conceded below, their fishing operations on open vessel decks and the high seas are fully observable by aerial overflights or from nearby vessels. JER at 60. Petitioners thus have no reasonable expectation of privacy regarding their commercial fishing operations; and the use of observers to record these activities does not constitute a “search” within the meaning of the fourth amendment.

**2. The En Banc Court Properly Ruled That, Even if “Searches,” Observer Data Collection Activities Fall Within the “Pervasively Regulated Industry” Exception to the Warrant Requirement.**

The en banc court held that even assuming observer data collection activities constitute “searches” within the meaning of the fourth amendment, the observer program falls squarely within the “pervasively regulated industry” exception to the fourth amendment warrant requirement. This holding was based on a careful application of this Court’s precedent. En Banc Op., Pet. App. at 15a-21a; see *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); *Donovan v. Dewey*, 452 U.S. 594 (1981).

This Court’s precedent establishes that the warrant requirement is not applicable where a regulatory scheme, aimed at an industry long subject to federal regulation, authorizes administrative inspections that, considered as a whole, are reasonable in light of (1) the limited expectation of privacy on the part of those subject to close regulation; (2) the necessity of the inspection program to effectuation of important federal interests; and (3) the presence of safeguards — such as a close tailoring of the inspection program to meet the regulatory interests — alleviating the need for any protection an administrative

warrant might otherwise afford. *See, e.g., Donovan v. Dewey*, 452 U.S. 594, 598-605 (1981).

The en banc court found — and petitioners do not seriously challenge — that the observer program satisfies all of these prerequisites.<sup>11</sup> Instead, petitioners contend that the “pervasively regulated industry” exception is *per se* inapplicable in the absence of a statute expressly authorizing the warrantless inspection program. *See* Pet. at 14-16. The en banc court properly ruled that this “novel constitutional claim” was without merit. En Banc Op., Pet. App. at 18.

**a. The En Banc Court Properly Ruled That Express Statutory Authorization Is Not a Prerequisite to the “Pervasively Regulated Industry” Exception to the Warrant Requirement.**

Petitioners divine the existence of an express authorization “requirement” from *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); and *Donovan v. Dewey*, 452

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<sup>11</sup>First, the en banc court found that federal regulation of the tuna fishing industry has been sufficiently longstanding and pervasive as to bring the industry within the scope of the pervasively regulated industry doctrine. En Banc Op., Pet. App. at 10a-19a.

Second, the en banc court found that the single overriding purpose of the MMPA — to ensure the continued preservation of marine mammals — is an important federal interest, *see* En Banc Op., Pet. App. at 3a, 17a; *see also Committee for Humane Legislation v. Richardson*, 414 F. Supp 297, 306 (D.D.C.) *aff’d* 540 F.2d 1141 (D.C. Cir. 1976), and that “[e]ffective implementation of the MMPA would be impossible without the use of observers for enforcement purposes.” En Banc Op., Pet. App. at 11a.

Finally, the en banc court found that the observer program provides a “constitutionally adequate substitute for a warrant” in that it establishes a predictable and a guided federal presence, imposes sharp limits on the discretion of observers to determine the scope of their observations, and provides a procedural mechanism to accommodate any specific privacy concerns. En Banc Op., Pet. App. at 19a-20a.



U.S. 594 (1981). See Pet. at 14-15. But the en banc court properly rejected this argument:

The captains assume that since the Supreme Court has held that a warrantless search of a closely regulated industry is reasonable when expressly authorized by Congress, the search of such a business violates the fourth amendment if it is conducted pursuant to regulation impliedly authorized by Congress. No authority is cited for this novel constitutional proposition.

En Banc Op., Pet. App. at 18a. The en banc court's holding on this issue is fully consistent with decisions from other circuits.<sup>12</sup>

Petitioners suggest that express statutory authorization is required because only Congress may act as a quasi-magistrate in determining the constitutionality of

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<sup>12</sup>See *United States v. Rucinski*, 658 F.2d 741, 745 (10th Cir. 1981), cert. denied, 455 U.S. 938 (1982) (express statutory authorization is not required where the administrative inspection program furthers substantial federal interests); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (warrantless inspection authorized by regulations of the Secretary of Agriculture upheld against fourth amendment challenge); *United States Nuclear Regulatory Commission v. Radiation Technology, Inc.*, 519 F. Supp. 1266, 1288-91 (D.N.J. 1981) (warrantless inspections authorized by regulations of the Nuclear Regulatory Commission proper under the pervasively regulated industry doctrine); *United States v. Williams*, 617 F.2d 1063, 1074 (5th Cir. 1980) (en banc) ("The source of authority for a search or a seizure need not be statutory . . . [There may] exist . . . some other source of authority, such as executive authority"). See also *United States v. Davis*, 482 F.2d 893, 908-10 (9th Cir. 1973) (warrantless pre-boarding airport search authorized by regulations of the Federal Aviation Administration upheld against fourth amendment challenge); *United States v. Schaeffer*, 461 F.2d 856, 858-59 (9th Cir.) cert. denied, 409 U.S. 881 (1972) (warrantless inspections authorized by regulations of the General Services Administration upheld against fourth amendment challenge).

an administrative inspection program.<sup>13</sup> Pet. at 15. However, the notion that Congress may perform a magisterial function, or that Congress is empowered to make a conclusive determination as to the propriety of a warrantless administrative inspection program, has been firmly rejected by this Court: "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); see also *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). As the en banc court properly concluded: "the proper inquiry when a warrantless search is challenged is whether it is authorized by the fourth amendment—not by an act of Congress." En Banc Op., Pet. App. at 18a.

**b. The En Banc Court Properly Found That the Observer Program Incorporates Safeguards Substituting for Any Protections an Administrative Warrant Would Afford.**

Finally, petitioners argue that a warrant should be required here because the effectiveness of the observer program does not depend on the use of "surprise" in-

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<sup>13</sup>Petitioners also suggest that an express statutory authorization requirement is supported by *Greene v. McElroy*, 360 U.S. 474 (1959). The en banc court properly rejected this argument. En Banc Op., Pet. App. at 8a. In *Greene*, the Court held that explicit congressional or executive authorization may be required "in areas of doubtful constitutionality" regarding "decisions of great constitutional import and effect." 360 U.S. at 507. Here, however, the observer program itself is not of such doubtful constitutionality, raising serious constitutional concerns. As the en banc court recognized, this Court has consistently held that administrative inspections of commercial property—particularly those subject to pervasive federal regulation—involve relatively limited intrusions on reasonable expectations of privacy, and that such inspections are subject to less vigorous constitutional scrutiny. *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); *United States v. Biswell*, 406 U.S. 311, 316 (1972). See also En Banc Op., Pet. App. at 17a-18a.

spections. Pet. at 17. As the en banc court properly found, this argument ignores that the observer program itself provides all of the safeguards that would be provided by a warrant, rendering a warrant in this particularized context nothing more than a formalistic gesture. En Banc Op., Pet. App. at 19a-20a.

In the administrative inspection setting, a warrant is designed to serve two functions: (1) to insure that the subject of inspection has been selected on the basis of neutral criteria; and (2) to impose limits on the discretion of officers in the field. See *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967).<sup>14</sup> This Court has recognized that a regulatory scheme may itself provide these safeguards, thus obviating the need for a warrant. Thus, in *Donovan v. Dewey*, 452 U.S. 594 (1981), which affirmed the constitutionality of warrantless mine inspections, this Court held that a warrant is not required to conduct administrative inspections in the "pervasively regulated industry" context when the inspection program: (1) establishes a predictable federal presence; (2) limits the scope of the inspection to activities subject to regulation; and (3) provides for a mechanism where the propriety of the particular inspection may be assessed in a judicial hearing. See *id.* at 603-05.

The en banc court properly found that the observer program already incorporates all of these protections. En Banc Op., Pet. App. at 19a-20a. First, the en banc court found that the observer program establishes a predictable and regular federal presence. En Banc Op., Pet. App. at 19a-20a. In advance of each year, the agency

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<sup>14</sup>Contrary to petitioners' suggestion, see Pet. at 15, it is well-settled that an administrative warrant does not require a showing of probable cause that the subject of an inspection is in violation of regulatory standards. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967).

sends a calendar of scheduled observer trips to all vessel owners, along with the statement of neutral criteria upon which the calendar is constructed. JER at 445-54. The observers have absolutely no discretion to determine which vessels to board. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (unbridled administrative discretion to determine which of a wide category of businesses to subject to inspection).

*Second*, the en banc court properly found that the MMPA regulatory scheme imposes sharp limits on the scope of observer data collection activities. En Banc Op., Pet. App. at 19a-20a. These activities are precisely delineated by the NMFS Field Manual, which authorizes the observation and recording *only* of fishing activities directly subject to the detailed MMPA regulations. *See* JER at 99-115, 428-44, 502. "[T]he observers must confine their observations to the tuna fishing operations of the vessel, which occur in the open sea or on deck." En Banc Op., Pet. App. at 16a.

*Third*, the observer regulations require that petitioners be provided with advance notice that observers will be stationed on their vessels. En Banc Op., Pet. App. at 20a. Moreover, the agency conducts pre-departure conferences with vessel owners, masters, observers and agency officials to ensure a common understanding of the scope of observer activities. *See* JER at 455-59. As the en banc court found, this provision not only eliminates the elements of surprise and anxiety offensive to the fourth amendment, *see Delaware v. Prouse*, 440 U.S. 648, 657 (1978), but also provides petitioners with an opportunity to seek a judicial declaration as to the propriety of a particular inspection, or to seek an order accommodating any unusual privacy interest that the vessel owner may have. En Banc Op., Pet. App. at 20a. *See also Donovan*

*v. Dewey*, 452 U.S. 594, 604-05 (1981).<sup>15</sup> Like the firearms dealer in *Biswell*, or the mine operator in *Donovan*, nothing in the observer program leaves petitioners “to wonder about the purposes of the inspector or the limits of his task.” *United States v. Biswell*, 406 U.S. 311, 316 (1972).

The en banc court thus properly concluded that the observer program itself provides all of the protections that would be afforded were a warrant required in the administrative search context of this case. Petitioners do not — and cannot — identify any additional protection an administrative warrant would provide. To require a warrant in this case would be nothing more than a hollow, formalistic gesture. Indeed, because the observer program in fact provides safeguards broader than those that would be afforded petitioners were an administrative warrant required here, in arguing the unconstitutionality of the observer program petitioners are forced to the ironic position that the observer program tramples on their rights because it does not involve “surprise” inspections. There is thus no reason for this Court to accept this case for review.

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<sup>15</sup>In addition, both 50 C.F.R. § 216.24(f) and the detailed MMPA regulations which observers monitor were adopted in accordance with the adjudicatory procedures of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, providing the fullest opportunity for notice, opportunity to be heard, and administrative and judicial review for all affected parties.

**CONCLUSION.**

For the foregoing reasons, the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit en banc should be denied.

Dated: May 24, 1984.

Respectfully submitted,

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**APPENDICES TO RESPONDENTS'  
BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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### A. STATUTES INVOLVED

#### **Marine Mammal Protection Act, Title 16 United States Code, Section 1361 Et Seq.**

##### **1. 16 U.S.C. Section 1361**

###### **§ 1361. *Congressional findings and declarations of policy***

The Congress finds that —

- (1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;
- (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;
- (3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;
- (4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;
- (5) marine mammals and marine mammal products either —



- (A) move in interstate commerce, or
- (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

## **2. 16 U.S.C. Section 1362**

### *§ 1362. Definitions*

For the purposes of this Act —

(1) The term “depletion” or “depleted” means any case in which —

(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of this chapter, determines that a species or population stock is below its optimum sustainable population;

(B) a State, to which authority for the conservation and management of a species or population

stock is transferred under section 1379 of this title, determines that such species or stock is below its optimum sustainable population; or

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 [16 U.S.C.A. § 1531 et seq.].

(2) The terms "conservation" and "management" mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

(3) The term "district court of the United States" includes the District Court of Guam, District Court of the Virgin Islands, District Court of Puerto Rico, District Court of the Canal Zone, and, in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii.

(4) The term "humane" in the context of the taking of a marine mammal means that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.

(5) The term "marine mammal" means any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or (B) pri-

marily inhabits the marine environment (such as the polar bear); and, for the purposes of this Act, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.

(6) The term "marine mammal product" means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.

(7) The term "moratorium" means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products, except as provided in this Act.

(8) The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

(9) The term "person" includes (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(10) The term "population stock" or "stock" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

(11) The term "Secretary" means —

(A) the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this Act with respect to members of the order Cetacea and members, other than walruses, of the order Pinnipedia, and

(B) the Secretary of the Interior as to all responsibility, authority, funding, and duties under this chapter with respect to all other marine mammals covered by this chapter.

(12) The term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

(13) The term "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and Northern Mariana Islands.

(14) The term "waters under the jurisdiction of the United States" means —

(A) the territorial sea of the United States, and

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

### 3. 16 U.S.C. Section 1371

§ 1371. *Moratorium on taking and importing marine mammals and marine mammal products*

(a) *Imposition; exceptions.* There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal products may be imported into the United States except in the following cases:

(1) Permits may be issued by the Secretary for taking and importation for purposes of scientific research and for public display if —

(A) the taking proposed in the application for any such permit, or

(B) the importation proposed to be made, is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act [16 USCS §§ 1401 et seq.]. The Commission and Committee shall recommend any proposed taking or importation which is consistent with the purposes and policies of section 2 of this Act [16 USCS § 1361]. The Secretary shall, if he grants approval for importation, issue to the importer concerned a certificate to that effect which shall be in such form as the Secretary of the Treasury prescribes and such importation may be made upon presentation of the certificate to the customs officer concerned.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best

marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. The Secretary shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 of this title [16 USCS §§ 1372-1374, 1381] permitting and governing such taking and importing, in accordance with such determinations: Provided, however, That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource

protection and conservation as provided in the purposes and policies of this Act: Provided further, however, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(B) Except for scientific research purposes as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

(4)(A) During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment —

(i) finds that the total of such taking during such five-year period will have a negligible impact on such species or stock; and

(ii) provides guidelines pertaining to the establishment of a cooperative system among the fishermen involved for the monitoring of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain, the permission to take marine mam-

mals under subparagraph (A) if the Secretary finds, after notice and opportunity for public comment, that —

- (i) the taking allowed under subparagraph (A) is having more than a negligible impact on the species or stock concerned; or
- (ii) the policies, purposes and goals of this chapter would be better served through the application of this title without regard to this subsection.

Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment —

- (i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and its habitat, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title; and



(ii) prescribes regulations setting forth —

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance; and

(II) requirements pertaining to the monitoring and reporting of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that —

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(b) *Exemptions for Alaskan natives.* Except as provided in Section 1379 of this title, the provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking —

- (1) is for subsistence purposes; or
- (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: *Provided*, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term “authentic native articles of handicrafts and clothing” means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and
- (3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this chapter, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking

of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this chapter. Such regulations shall be prescribed after notice and hearing required by section 1373 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

(c) *Hardship exemption.* In order to minimize undue economic hardship to persons subject to this Act, other than those engaged in commercial fishing operations referred to in subsection (a)(2) of this Section, the Secretary, upon any such person filing an application with him and upon filing such information as the Secretary may require showing, to his satisfaction, such hardship, may exempt such person or class of persons from provisions of this Act for no more than one year from the date of the enactment of this Act [enacted Oct. 21, 1972], as he determines to be appropriate.

#### **4. 16 U.S.C. Section 1372**

##### **§ 1372. Prohibitions**

(a) *Taking.* Except as provided in sections 1371, 1373, 1374, 1379, 1381 and 1383 of this title, it is unlawful —

(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered

into before the effective date of this title [see Effective date note below] or by any statute implementing any such treaty, convention, or agreement —

(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

(3) for any person, with respect to any marine mammal taken in violation of this subchapter, to possess that mammal or any product from that mammal; and

(4) for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; and

(5) for any person to use, in a commercial fishery, any means or methods of fishing in contravention of any regulations or limitations, issued by the Secretary for that fishery to achieve the purposes of this chapter.

(b) *Importation of pregnant or nursing mammals; depleted species or stock; inhumane taking.* Except pursuant to a permit for scientific research issued under section 1374(c), of this title, it is unlawful to import into the United States any marine mammal if such mammal was —

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the

Federal Register, designated as a depleted species or stock; or

(4) taken in a manner deemed inhumane by the Secretary.

(c) *Importation of illegally taken mammals.* It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was —

(A) taken in violation of this title; or

(B) taken in another country in violation of the law of that country.

(2) Any marine mammal product if —

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection; or

(B) the sale in commerce of such product in the country of origin of the product is illegal;

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact incident to the catching of the fish.

(d) *Nonapplicability of prohibitions.* Subsections

(b) and (c) of this section shall not apply —

(1) in the case of marine mammals or marine mammal products, as the case may be, to which subsection (b)(3) of this section applies, to such items imported into the United States before the date on which the Secretary publishes notice in the Federal Register of his proposed rulemaking with respect to the designation of the species or stock concerned as depleted; or

(2) in the case of marine mammals or marine mammal products to which subsection (c)(1)(B) or (c)(2)(B) of this section applies, to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

(e) *Retroactive effect.* This Act shall not apply with respect to any marine mammal taken before the effective date of this Act [see effective date note below], or to any marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before such date.

(f) *Commercial taking of whales.* It is unlawful for any person or vessel or other conveyance to take any species of whale incident to commercial whaling in waters subject to the jurisdiction of the United States.

## 5. 16 U.S.C. Section 1373

§ 1373. *Regulations on taking of marine mammals*

(a) *Necessity and appropriateness.* The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this Act [16 USCS § 1361].

(b) *Factors considered in prescribing regulations.* In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect

the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on —

- (1) existing and future levels of marine mammal species and population stocks;
- (2) existing international treaty and agreement obligations of the United States;
- (3) the marine ecosystem and related environmental considerations;
- (4) the conservation, development, and utilization of fishery resources; and
- (5) the economic and technological feasibility of implementation.

(c) *Allowable restrictions.* The regulations prescribed under subsection (a) of this section for any species or population stock of marine mammal may include, but are not limited to, restrictions with respect to —

- (1) the number of animals which may be taken or imported in any calendar year pursuant to permits issued under section 104 of this title [16 USCS § 1374];
- (2) the age, size, or sex (or any combination of the foregoing) of animals which may be taken or imported, whether or not a quota prescribed under paragraph (1) of this subsection applies with respect to such animals;
- (3) the season or other period of time within which animals may be taken or imported;
- (4) the manner and locations in which animals may be taken or imported; and
- (5) fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery.

(d) *Procedure.* Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to section 101(a)(3)(A) of this title [16 USCS § 1371 (a)(3)(A)] and on such regulations, except that, in addition to any other requirements imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section —

- (1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;
  - (2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;
  - (3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and
  - (4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations.
- (e) *Periodic review.* Any regulation prescribed pursuant to this section shall be periodically reviewed, and may be modified from time to time in such manner as the Secretary deems consistent with and necessary to carry out the purposes of this Act.
- (f) *Report to Congress.* Within six months after the effective date of this Act [see effective date note below] and every twelve months thereafter, the Secretary



shall report to the public through publication in the Federal Register and to the Congress on the current status of all marine mammal species and population stocks subject to the provisions of this Act. His report shall describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits pursuant to this title [16 USCS §§ 1371 et seq.] to assure the well-being of such marine mammals.

**6. 16 U.S.C. Section 1374**

§ 1374. *Permits*

(a) *Issuance.* The Secretary may issue permits which authorize the taking or importation of any marine mammal.

(b) *Requisite provisions.* Any permit issued under this section shall —

(1) be consistent with any applicable regulation established by the Secretary under section 103 of this title [16 USCS § 1373], and

(2) specify —

(A) the number and kind of animals which are authorized to be taken or imported,

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

In any case in which an application for a permit cites as a reason for the proposed taking the overpopulation of a particular species or population stock, the Secre-

tary shall first consider whether or not it would be more desirable to transplant a number of animals (but not to exceed the number requested for taking in the application) of that species or stock to a location not then inhabited by such species or stock but previously inhabited by such species or stock.

(c) *Importation for display or research.* Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of display or scientific research shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of display or scientific research shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

(d) *Application procedures; notice; hearing; review.*

(1) The Secretary shall prescribe such procedures as are necessary to carry out this section, including the form and manner in which application for permits may be made.

(2) The Secretary shall publish notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data or views, with respect to the taking or importation proposed in such application.

(3) The applicant for any permit under this section must demonstrate to the Secretary that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this

Act [16 USCS §§ 1361 et seq.] and the applicable regulations established under section 103 of this title [16 USCS § 1373].

(4) If within thirty days after the date of publication of notice pursuant to paragraph (2) of this subsection with respect to any application for a permit any interested party or parties request a hearing in connection therewith, the Secretary may, within sixty days following such date of publication, afford to such party or parties an opportunity for such a hearing.

(5) As soon as practicable (but not later than thirty days) after the close of the hearing or, if no hearing is held, after the last day on which data, or views, may be submitted pursuant to paragraph (2) of this subsection, the Secretary shall (A) issue a permit containing such terms and conditions as he deems appropriate, or (B) shall deny issuance of a permit. Notice of the decision of the Secretary to issue or to deny any permit under this paragraph must be published in the Federal Register within ten days after the date of issuance or denial.

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.], may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

(e) *Modification, suspension, and revocation.*

(1) The Secretary may modify, suspend, or revoke in whole or part any permit issued by him under this section —

(A) in order to make any such permit consistent with any change made after the date of issuance of such permit with respect to any applicable regulation prescribed under section 103 of this title [16 USCS § 1373], or

(B) in any case in which a violation of the terms and conditions of the permit is found.

(2) Whenever the Secretary shall propose any modification, suspension, or revocation of a permit under this subsection, the permittee shall be afforded opportunity, after due notice, for a hearing by the Secretary with respect to such proposed modification, suspension, or revocation. Such proposed action by the Secretary shall not take effect until a decision is issued by him after such hearing. Any action taken by the Secretary after such a hearing is subject to judicial review on the same basis as is any action taken by him with respect to a permit application under paragraph (5) of subsection (d) of this section.

(3) Notice of the modification, suspension, or revocation of any permit by the Secretary shall be published in the Federal Register within ten days from the date of the Secretary's decision.

(f) *Possession of permit by issuee or his agent.* Any permit issued under this section must be in the possession of the person to whom it is issued (or an agent of such person) during —

(1) the time of the authorized or taking [taking or] importation;

(2) the period of any transit of such person or agent which is incident to such taking or importation; and

(3) any other time while any marine mammal taken or imported under such permit is in the possession of such person or agent.

A duplicate copy of the issued permit must be physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of storage, transit, supervision, or care.

(g) *Fees.* The Secretary shall establish and charge a reasonable fee for permits issued under this section.

(h) *General permits.* Consistent with the regulations prescribed pursuant to section 103 of this title [16 USCS § 1373] and to the requirements of section 101 of this title [16 USCS § 1371], the Secretary may issue general permits for the taking of such marine mammals, together with regulations to cover the use of such general permits.

## **7. 16 U.S.C. Section 1375**

### **§ 1375. *Penalties***

(a) (1) Any person who violates any provision of this subchapter or of any permit or regulation issued thereunder may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action

in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

(2) In any case involving an alleged unlawful importation of a marine mammal or marine mammal product, if such importation is made by an individual for his own personal or family use (which does not include importation as an accommodation to others or for sale or other commercial use), the Secretary may, in lieu of instituting a proceeding under paragraph (1), allow the individual to abandon the mammal or product, under procedures to be prescribed by the Secretary, to the enforcement officer at the port of entry.

(b) Any person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder shall, upon conviction, be fined not more than \$20,000 for each such violation, or imprisoned for not more than one year, or both.

## **8. 16 U.S.C. Section 1376**

§ 1376. *Seizure and forfeiture of cargo*

(a) *Application of consistent provisions.* Any vessel or other conveyance subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall have its entire cargo or the monetary value thereof subject to seizure and forfeiture. All provisions of law relating to the seizure, judicial forfeiture, and condemnation of cargo for violation of the customs laws, the disposition of such cargo, and the proceeds from the sale thereof, and the remission or mitigation of any such forfeiture, shall apply with respect to the cargo of any vessel or other conveyance seized in connection with the unlawful taking of a marine mammal insofar as such pro-

visions of law are applicable and not inconsistent with the provisions of this title.

(b) *Penalties.* Any vessel subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall be liable for a civil penalty of not more than \$25,000. Such penalty shall be assessed by the district court of the United States having jurisdiction over the vessel. Clearance of a vessel against which a penalty has been assessed, from a port of the United States, may be withheld until such penalty is paid, or until a bond or otherwise satisfactory surety is posted. Such penalty shall constitute a maritime lien on such vessel which may be recovered by action in rem in the district court of the United States having jurisdiction over the vessel.

(c) *Reward for information leading to conviction.* Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the fine incurred but not to exceed \$2,500 to any person who furnishes information which leads to a conviction for a violation of this title. Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

## **9. 16 U.S.C. Section 1377**

### **§ 1377. *Enforcement***

(a) *Utilization of personnel.* Except as otherwise provided in this title, the Secretary shall enforce the provisions of this title. The Secretary may utilize, by agreement, the personnel, services, and facilities of

any other Federal agency for purposes of enforcing this title.

(b) *State officers and employees.* The Secretary may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this title. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees of the United States for the purposes of any laws administered by the Civil Service Commission.

(c) *Warrants and other process for enforcement.* The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in United States district courts, as may be required for enforcement of this title and any regulations issued thereunder.

(d) *Execution of process; arrest; search; seizure.* Any person authorized by the Secretary to enforce this title may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this title. Such person so authorized may, in addition to any other authority conferred by law —

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this title or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a



vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this title or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provisions of this title or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this title or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

(e) *Disposition of seized cargo.* (1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under section 105(a) or (b) of this title [16 USCS § 1375(a) or (b)]. All marine mammals or marine mammal products or other cargo so seized shall be held by any person authorized by the Secretary pending disposition of such proceedings. The owner or consignee of any such marine mammal or marine mammal product or other cargo so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary.

(2) The Secretary may, with respect to any proceeding under section 105(a) or (b) of this title [16 USCS § 1375(a) or (b)], in lieu of holding any marine mammal or marine mammal product or other

cargo, permit the person concerned to post bond or other surety satisfactory to the Secretary pending the disposition of such proceeding.

(3) (A) Upon the assessment of a penalty pursuant to section 105(a) of this title [16 USCS § 1375(a)], all marine mammals and marine mammal products or other cargo seized in connection therewith may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate.

(B) Upon conviction for violation of section 105(b) of this title [16 USCS § 1375(b)], all marine mammals and marine mammal products seized in connection therewith shall be forfeited to the Secretary for disposition by him in such manner as he deems appropriate. Any other property or item so seized may, at the discretion of the court, be forfeited to the United States or otherwise disposed of.

(4) If with respect to any marine mammal or marine mammal product or other cargo so seized —

(A) a civil penalty is assessed under section 105(a) of this title [16 USCS § 1375(a)] and no judicial action is commenced to obtain the forfeiture of such mammal or product within thirty days after such assessment, such marine mammal or marine mammal product or other cargo shall be immediately returned to the owner or the consignee; or

(B) no conviction results from an alleged violation of section 105(b) of this title [16 USCS § 1375(b)], such marine mammal or marine mammal product or other cargo shall immediately be returned to the owner or consignee if the Secretary

does not, with[in] thirty days after the final disposition of the case involving such alleged violation, commence proceedings for the assessment of a civil penalty under section 105(a) of this title [16 USCS § 1375(a)].

**10. 16 U.S.C. Section 1381**

**§ 1381. *Commercial fisheries gear development***

(a) *Research and development program; report to Congress; authorization of appropriations.* The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act [enacted Oct. 21, 1972], the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of \$1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

(b) *Reduction of level of taking of marine mammals incidental to commercial fishing operations.* The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section 101(a)(2) of this title [16 USCS § 1371(a)(2)], as

he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5, United States Code [5 USCS § 553]. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

(c) *Reduction of level of taking of marine mammals in tuna fishery.* Additionally, the Secretary and Secretary of State are directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to effect essential compliance with the regulatory provisions of this Act [16 USCS §§ 1361 et seq.] so as to reduce to the maximum extent feasible the incidental taking of marine mammals by vessels involved in the tuna fishery. The Secretary and Secretary of State are further directed to request the Director of Investigations of the Inter-American Tropical Tuna Commission to make recommendations to all member nations of the Commission as soon as is practicable as to the utilization of methods and gear devised under subsection (a) of this section.

(d) *Research and observation.* Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and

observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

11. 16 U.S.C. Section 1382

§ 1382. *Regulations and administration*

(a) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title.

(b) Each Federal agency is authorized and directed to cooperate with the Secretary, in such manner as may be mutually agreeable, in carrying out the purposes of this title.

(c) The Secretary may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of this title and on such terms as he deems appropriate with any Federal or State agency, public or private institution, or other person.

(d) The Secretary shall review annually the operation of each program in which the United States participates involving the taking of marine mammals on land. If at any time the Secretary finds that any such program cannot be administered on lands owned by the United States or in which the United States has an interest in a manner consistent with the purposes of [or] policies of this chapter, he shall suspend the opera-

tion of that program and shall include in the annual report to the public and the Congress required under section 1373(f) of this title his reasons for such suspension, together with recommendations for such legislation as he deems necessary and appropriate to resolve the problem.

## B. REGULATION INVOLVED

### 50 C.F.R. Section 216.24(f)

(45 Fed. Reg. 72196 (October 31, 1980))

(f) *Observers.* — (1) The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certificated vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

(4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering

and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

(5) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, influence or attempt to influence an observer placed aboard a vessel.